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No. 510

In the

Supreme Court of the United States

OCTOBER TERM, 1962

TEXAS CARBONATE COMPANY,
Petitioner,

v.

R. L. PHINNEY, DISTRICT DIRECTOR OF INTERNAL REVENUE,
Respondent.

REPLY BRIEF FOR PETITIONER

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

There is one question and one question only for decision in this case. That question is: Was Luther H. Miller an employee of the Texas Carbonate Company in the years 1953-1954, so that the company would be bound to pay FICA and FUTA taxes? The facts are quite simple.

Late in 1938 Mr. Miller learned that there was such a material as amorphous limestone and that the same would probably make a better calcium supplement in livestock

feeding. Within a few days after this knowledge came to him he learned of a deposit of this natural material near Florence, in Williamson County, Texas, and immediately arranged to take it over. He arranged with his brother for finances; arranged for and caused to be incorporated the Texas Carbonate Company; and arranged for the building of a mill to dry it and pack it. Learning that none of the others interested in the project could sell it, L. H. Miller refused to undertake the selling of it on a salary basis, but did agree to undertake the sale of this material as an independent operator on a commission basis of 50¢ a ton, which was 10% of the sale price. For the first five years his commissions were not sufficient to pay his travel expenses, but he continued working and finally got it on to such a basis that it was a profitable venture for himself as well as for the company.

The record shows that at no time in his selling of this material was he ever under any control or direction of any kind from anybody, and Judge Rice of the District Court found that he could not be deprived of his vested right in his commission under the original agreement. In other words, he could not be discharged (TR 132). At the same time that he was selling he was an officer of the company; for awhile General Manager, later only a vice-president. In the course of time from the early part of 1939, when this company was organized, until 1953 the Internal Revenue Department made no attempt to claim that he was an employee of the Texas Carbonate Company.

In January of 1952, the Board of Directors authorized an increase of 25¢ a ton in his commission. At that time he was only a vice-president of the company. A brother was manager of the plant and all of the operations of the company. All Luther Miller had to do was to sell the product. During the thirteen years of the operation of this company, from 1939 to 1952, Luther Miller at one time helped his brother investigate to see if they could get on REA for electrial power rather than the Texas Power and Light, which would save the company some money. During this time he signed some of the income tax returns. Once in awhile he would stay in the plant if his brother was out of town, but this was most infrequent. He undertook to see if a sale could be had of an extremely fine product to be used in flour. Now and then in traveling he would ask somebody to pay their bill. He never was paid as an officer of the Texas Carbonate Company one single dime as wages nor was he even paid his expense the few times that he was doing something for the company.

It is respectfully submitted to Your Honors that this case is governed by the opinions of the Supreme Court in the following cases:

New Deal Cab Co. v. Fahs, 174 F. 2d 318;

Economy Cab Co. v. Fahs, 174 F. 2d 321;

United States v. Thorson, 282 F. 2d 157, opinion by Chief Judge Woodbury, in which it is said that the employment relationship is to be decided by the application of the rules of the common law.

In the case of *Safeway Stores, Inc. v. Herbert Wilcox, 220 F. 2d 661*, Mr. Circuit Judge Pickett for the Tenth Circuit says:

> "Generally speaking, an employee or servant is one who is under the control of, performs services for, and *is paid by* a master or employer for those services."

The case of *Benson v. Social Security Board, 172 F. 2d 682*, by Circuit Judge Huxman for the Tenth Circuit is another case in point.

The case of *Zipser v. Ewing, 197 F. 2d 728*, goes along this same way.

It is believed by counsel for the Texas Carbonate Company that the laws of the State of Texas regarding unemployment compensation do have something to do with this case, and we respectfully call the court's attention to the case of *State v. Kenyon, Inc., 153 S. W. 2d 195, Writ of Error refused.* If Luther Miller could not have unemployment compensation, surely the company would not be required to pay taxes on commissions that he earned under a separate contract.

Judge Rice's finding that Miller could not be deprived of his commissions under his contract with the corporation it seems is absolutely determinative of this case. If he could not be fired; if he was not drawing pay from any other source; if he could not be separated from the commissions that he earned over the fourteen year period as an independent seller of the company's product, how in the world could the company be held responsible for FICA and FUTA taxes? Surely this is not a case where a man is an employee of a company,

when in twenty years time he has done no more than ten ordinary transactions for the company on his own hook, without pay and at his own expense.

It is respectfully submitted that the Petition for Writ of Certiorari should be granted and the opinion of the District Court and the Circuit Court reversed.

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